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Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

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Report of the Secretary-General

Summary

The present report, prepared pursuant to General Assembly resolution 68/114, contains comments and observations of Governments on the consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm.

* A/71/50.

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I. Introduction

1. The present report has been prepared pursuant to paragraph 3 of General Assembly resolution 68/114, in which the Assembly invited Governments to submit further comments on any future action, in particular on the form of the articles on prevention of transboundary harm from hazardous activities and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, bearing in mind the recommendations made by the International Law Commission in that regard, including in relation to the elaboration of a convention on the basis of the articles, as well as on any practice in relation to the application of the articles and principles.

2. The Secretary-General, in a circular note dated 13 January 2014, drew the attention of Governments to resolution 68/114, and a reminder was sent out on 12 January 2015 and 24 December 2015. The present report should be read together with the previous reports of the Secretary General on this item (A/65/184 and Add.1 and A/68/170).

II. Comments and observations received from Governments

Australia

3. Australia welcomed the valuable work of the International Law Commission on the prevention of transboundary harm from hazardous activities and the allocation of loss in the case of such harm. It also welcomed the development of the articles and the elaboration of the principles. The gravity of the risk of transboundary harm from hazardous activities reinforced the importance of a consistent, coherent, widely-supported and fair international framework of general standards of conduct and practice for the prevention of transboundary harm and allocation of loss if such harm occurred.

4. The view of Australia was that the best way to ensure the progressive development of international law in this context was for the articles to remain in their current form, as authoritative guidance and clear and comprehensive standards for all States to follow. Australia did not think codification was necessary or desirable at this time.

El Salvador

5. El Salvador reiterated (see A/68/170, paras. 10-14) its position that it considered it appropriate to initiate the process towards the elaboration of a convention on the basis of the articles and the principles. Those articles and principles constituted an important contribution to the field and would enable the establishment of rules of general application that would help, among other things, to ensure the prevention of transboundary harm, thereby promoting the principle of good neighbourliness between States.

6. The instrument should take into account the principles contained in the Charter of the United Nations, the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development. El Salvador emphasized the importance of the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies.

It also highlighted the obligation of States to ensure that activities within their jurisdiction or control would not cause damage to the environment and areas that are outside the limits of their national jurisdiction.

7. Moreover, El Salvador noted that the instrument should include aspects of liability for transboundary environmental damage and measures to ensure adequate compensation and reparation for transboundary harm caused by activities undertaken within their jurisdiction. It should give emphasis and priority to preventive measures, urging States to adopt appropriate measures within their jurisdiction to prevent transboundary damage and minimize the risk of causing such harm.

Lebanon

8. Lebanon commented that the subject of transboundary harm from hazardous activities and allocation of loss in the case of such harm covered a wide field and included all the activities that caused transboundary harm. While many issues fell under the heading of "transboundary harm from hazardous activities", Lebanon considered that, to date, no clear laws had been formulated to oblige States causing the harm to bear responsibility for transboundary loss, for example, radioactive contamination from accidents at nuclear reactors or the pollution of rivers and the oceans.

9. In this context and with regard to related issues in civil aviation affairs, Lebanon observed that the International Civil Aviation Organization had accorded great importance to the subject of environmental pollution caused by aircraft using fossil fuels. This found expression in the formation of committees, the convening of meetings and the holding of workshops to study the subject and devise methods and solutions for reducing as much as possible the amount of harmful emissions caused by such pollution. This type of harm was transboundary and the damage it caused extended across the entire globe, affecting all countries of the world. It also represented a significant part of the total amount of pollution emitted by vehicle use, factory operation and other polluting activities that, together, heralded grave repercussions for the world's climate.

10. However, Lebanon pointed out that there was considerable discrepancy between one State and another in the amount of gas emissions caused by burning that type of fuel, depending on the commercial, industrial and tourism activity of each State. Accordingly, Lebanon believed that it was essential to create a legal framework at the General Assembly level, going beyond principles and recommendations, to oblige States causing most of the pollution-related harm to bear most of the responsibility. An international funding mechanism, in the form of a tax on fossil fuel consumption that would take into account the responsibility of States and corporations for the amount of emissions produced by the level of their commercial and industrial activity, would help all States to take the measures necessary to limit and reduce the impact of pollution from gas emissions. The mechanism would be supervised and administered by a United Nations body. It would help all States, particularly less developed ones, to fund research, to take measures necessary to limit pollution levels and to undertake projects designed to tip the balance back towards nature, such as combating deforestation and financing environmentally-friendly renewable energy projects. The adoption of such a mechanism could be a significant step forward in reducing transboundary harm and

an effective way of distributing loss and compensating for the harm done by States in a manner commensurate with the responsibility for causing it.

11. In a further comment, Lebanon noted that the principles at issue complemented the relevant international instruments, including the Stockholm Convention on Persistent Organic Pollutants, to which Lebanon had acceded by Act No. 432 of 29 July 2002, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, to which Lebanon had acceded by Act No. 387 of 4 November 1994.

12. The principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities were not clear, nor did the principles and the provisions of the resolution make reference to the basis for the determination thereof. This was also the case with regard to the entities that were authorized to determine the amount of loss, the acceptance of the amount by the relevant parties and the commitment of those parties to honour it.

13. The principles and provisions of the resolution placed the onus on the operator to remedy the harm and restore conditions to the way that they had been prior to the occurrence of the harm. Lebanon agreed with this. On the other hand, some of the other principles and provisions stipulated that the State had to provide supplementary financial resources should the compensation offered be inadequate. This placed a financial burden on the State, a burden Lebanon did not believe the State should have to bear, given that the proposed principles and provisions provided that the operator had to maintain guarantees that were in line with the nature of the activity. The State should therefore not be held responsible for partially covering the losses or damages caused by an operator.

Paraguay

14. Paraguay observed that the articles that had been drawn up by the International Law Commission sought to regulate activities not prohibited by international law that involved a risk of causing significant transboundary harm (article 1). According to the articles, such harm could affect persons, property or the environment. Paraguay noted that the term "transboundary" implied not only that the harm occurred in a transboundary area, but also that the harm could be caused in the territory of, or in other places under the jurisdiction or control of, a State other than the State of origin, whether or not the States concerned shared a common border (article 2).

15. In the view of Paraguay, the legal regime thus established by the Commission recognized that States exercise sovereignty over the natural resources that are located in their territory or other places under their jurisdiction, but cautioned that such sovereignty does not imply an unrestricted liberty with regard to activities that they may undertake or authorize in those territories. The issue involved was that of State liability for damage arising as a consequence of an act that was not itself prohibited by international law.

16. Paraguay recognized that the progress of science makes possible the performance of especially dangerous activities which generate considerable risks to persons, property and the environment.[1] Within this type of activity, one could

[1] Antonio Remiro Brotóns, *Derecho Internacional* (Madrid, McGraw Hill, 1997), p. 415.

include the risks of space exploration or the peaceful use of nuclear energy. In such cases, national frontiers did not constitute a barrier safeguarding against the potential harm that such activities might cause in the territory of other States.

17. Paraguay observed that, for that reason, the articles set forth preventive measures (article 3), urged cooperation between the States that might be affected (article 4), established the obligation to notify and inform (article 8), created a system of consultations (article 9), provided that information must be public (article 13) and instituted a system for the peaceful resolution of disputes (article 19), among other provisions.

18. Paraguay noted that the principles recognized the need to ensure prompt and adequate compensation to victims of transboundary damage and to preserve and protect the environment (principle 3). The operator would be liable for such compensation, but without prejudice to the possibility of a subsidiary liability of the State of origin. It was likewise established that the liability should not require a proof of fault (principle 4). Among other obligations incumbent on the State of origin, it was provided that the latter had to give notification without delay of any incident that could cause harm to the States that was or could be affected. Furthermore, the State of origin had to ensure that appropriate response measures were adopted, relying on the best scientific and technological data available (principle 5).

19. Paraguay pointed out that the principles took into account that, given the scale of the potential harm, the civil courts might not be able to levy a sufficient amount of compensation payable by the operator, thereby resulting in a need to seek additional assistance from the State of origin, as well as international cooperation in order to contain and remediate the harm.